

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

**CIVIL SERVICE COMMISSION**

One Ashburton Place, Room 503  
Boston, MA 02108

PATRICK HOARTY,  
Appellant

v.

D1-12-325

BOTON FIRE DEPARTMENT,  
Respondent

Appearance for Appellant:

*Pro Se*  
Patrick Hoarty

Appearance for Respondent:

Robert J. Boyle, Jr., Esq.  
City of Boston  
Office of Labor Relations  
Boston City Hall: Room 624  
Boston, MA 02201

Commissioner:

Christopher C. Bowman

**DECISION ON RESPONDENT’S MOTION TO DISMISS**

On November 27, 2012, the Appellant, Patrick Hoarty (Mr. Hoarty) filed an appeal with the Civil Service Commission (Commission), contesting his termination as a firefighter by the City of Boston (City)’s Fire Department (Fire Department). A pre-hearing conference was held at the offices of the Commission on December 18, 2012 and a motion hearing was held on February 4, 2013 to hear the Fire Department’s Motion to Dismiss. I heard oral argument from Mr. Hoarty, who appeared pro se, and counsel for the Fire Department.

Based on the statements of the parties and the documents submitted, I find the following:

1. Until his termination, Mr. Hoarty was a permanent, tenured civil service employee who held the position of firefighter in the City's Fire Department.
2. By letter dated October 16, 2012, which Mr. Hoarty received on October 22, 2012, the Fire Department notified Mr. Hoarty that, since he had been absent without authorization for more than fourteen (14) days, he was being terminated pursuant to G.L. c. 31, § 38. The letter stated that Mr. Hoarty had ten (10) days to request a hearing "before the Department."
3. On October 26, 2012, Mr. Hoarty sent an email to the Fire Department with correspondence attached which stated in pertinent part: "I formally request a hearing before the Commonwealth's Human Resources Division in order to address these and many other issues."
4. The City's Fire Department did not reply to Mr. Hoarty's October 26, 2012 correspondence.
5. On November 27, 2012, Mr. Hoarty filed the instant appeal with the Commission.

*Mr. Hoarty's Argument*

Mr. Hoarty argues that he and his physician were in regular contact with Fire Department officials to inform them of his medical condition and, thus, the City erred by concluding that he was absent without leave. Further, Mr. Hoarty argues that, although he mistakenly requested a hearing before the state's Human Resources Division (HRD), he did indeed file a written request with the Fire Department seeking a hearing and the Fire Department erred by not granting him one.

### *Fire Department's Argument*

The Fire Department argues that the Commission has no jurisdiction to hear an appeal where the termination was made under Section 38. Further, the Fire Department argues that it was not obligated to grant Mr. Hoarty a hearing since his written request referenced a hearing before HRD, not the Fire Department.

### *Analysis*

The party moving for summary disposition of an appeal before the Commission pursuant to 801 C.M.R. 7.00(7)(g)(3) or (h) is entitled to dismissal as a matter of law under the well-recognized standards for summary disposition, i.e., “viewing the evidence in the light most favorable to the non-moving party”, the movant has presented substantial and credible evidence that the opponent has “no reasonable expectation” of prevailing on at least one “essential element of the case”, and that the non-moving party has not produced sufficient “specific facts” to rebut this conclusion. See, e.g., Lydon v. Massachusetts Parole Bd., 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249, 881 (2008).

G.L. c.31, § 38, concerning unauthorized absences, provides, in relevant part:

Upon reporting an unauthorized absence to the administrator pursuant to section sixty-eight,<sup>1</sup> an appointing authority shall send by registered mail a statement to the person named in the report, informing him that (1) he is considered to have permanently and voluntarily separated himself from the employ of such appointing authority and (2) he may within ten days after the mailing of such statement request a hearing before the appointing authority. A copy of such statement shall be attached to such report to the administrator.

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<sup>1</sup> Mass.G.L.c.31, §68 states, in part: “Each appointing authority shall report in writing forthwith to the administrator of any . . . absence for more than a month because of illness or injury, unauthorized absence [and]. . . leave of absence for more than a month. . . .” See also PAR.13 (governing prior notice for leaves of absence longer than three months)

The appointing authority may restore such person to the position formerly occupied by him or may grant a leave of absence pursuant to section thirty-seven if such person, within fourteen days after the mailing of such statement, files with the appointing authority a written request for such leave, including in such request an explanation of the absence which is satisfactory to the appointing authority. The appointing authority shall immediately notify the administrator in writing of any such restoration or the granting of any such leave.

If an appointing authority fails to grant such a person a leave of absence pursuant to the provisions of the preceding paragraph or, after a request for a hearing pursuant to the provisions of this section, fails to restore such person to the position formerly occupied by him, such person may request a review by the administrator. The administrator shall conduct such review, provided that it shall be limited to a determination of whether such person failed to give proper notice of the absence to the appointing authority and whether the failure to give such notice was reasonable under the circumstances.

No person who has been reported as being on unauthorized absence under this section shall have recourse under sections forty-one through forty-five with respect to his separation from employment on account of such absence.

For the purposes of this section, unauthorized absence shall mean an absence from work for a period of more than fourteen days for which no notice has been given to the appointing authority by the employee or by a person authorized to do so, and which may not be charged to vacation or sick leave, or for which no leave was granted pursuant to the provisions of section thirty-seven.

Section 38 has been interpreted consistently to mean that jurisdiction to review a decision by an appointing authority to separate an employee for “unauthorized absence” lies exclusively with the Personnel Administrator [HRD]. See, e.g., Police Comm’r v. Civil Service Comm’n, 29 Mass.App.Ct. 470 (1990), rev.den., 409 Mass. 1102 (1991), appeal after remand sub nom, Police Comm’r v. Personnel Adm’r, 39 Mass.App.Ct. 360 (1995), aff’d, 423 Mass. 1017 (1996). See also Canney v. Municipal Ct., 368 Mass. 648 (1975); Sisca v. City of Fall River, 65 Mass.App.Ct. 266 (2005), rev.den., 446 Mass. 1104 (2006); Town of Barnstable v. Personnel Adm’r, 56 Mass.App.Ct. 1106 (2002) (Rule 1:28 opinion); DeSimone v. Civil Service Comm’n, 27 Mass.App.Ct. 1177 (1989). The Commission’s decisions have been uniformly to the same effect. Alves v. Fall River

School Dep't, 22 MCSR 4 (2009); Donnelly v. Cambridge Public Schools, 21 MCSR 665 (2008); O'Hare v. Brockton, 20 MCSR 9 (2007); McBride v. Fall River, 19 MCSR 325 (2006); Fontanez v. Boston Police Dep't, 19 MCSR 159 (2006); Pimental v. Department of Correction, 16 MCSR 54 (2003), aff'd sub nom, Pimental v. Civil Service Comm'n, Suffolk Superior Civ. No. SUCV2003-5908 (June 6, 2005); McDonald v. Boston Public Works, 14 MCSR 60 (2001); Sheehan v. Worcester, 11 MCSR 100 (1998); Brindle v. Taunton, 7 MCSR 112 (1994); Tomasian v. Boston Police Dep't, 6 MCSR 221 (1993).

The questions presented by Mr. Hoarty, whether he was absent without leave and whether or not the Fire Department failed to provide him with a hearing, are precisely the essential issues described in Section 38 that must be addressed through review by HRD, not the Commission.

Accordingly, since this termination was made under Section 38, the Commission is obliged to dismiss the appeal for lack of jurisdiction. We see nothing in the statute, however, that would bar Mr. Hoarty from filing an appeal with HRD, even as of this date. The Fire Department's failure to conduct a hearing and/or provide Mr. Hoarty with notice that it would not do so, would appear to toll any time period for filing an appeal with HRD. While Mr. Hoarty may have misconstrued the wording of the statute, his written request for a hearing was unambiguous and the Fire Department erred by not conducting a hearing, as required by the statute.

#### *Conclusion*

For all of the above reasons, Mr. Hoarty's appeal under Docket No. D1-12-325 is hereby *dismissed*.

Civil Service Commission

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Christopher C. Bowman  
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman and McDowell, Commissioners [Marquis, Stein – Absent]) on March 7, 2013.

A true Copy. Attest:

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Commissioner  
Civil Service Commission

Either party may file a motion for reconsideration within ten days of the receipt of this decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:  
Patrick Hoarty (Appellant)  
Robert J. Boyle, Jr., Esq. (for Respondent)  
John Marra, Esq. (HRD)